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Nos. 79-1404, 79-1408, 79-1415, and 79-1489

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PENNHURST STATE SCHOOL AND HOSPITAL, *et al.*,
v. *Petitioners,*

TERRI LEE HALDERMAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Does the Developmentally Disabled Assistance and Bill of Rights Act require the States to develop, at their own expense, programs and facilities to provide "appropriate treatment" and "the least restrictive environment" for each developmentally disabled person?

2. If the Act imposes such requirements, does 42 U.S.C. § 1983 authorize their enforcement through private actions or does the Act commit their exclusive enforcement to the Secretary of Health and Human Services?

3. If the Act imposes such requirements and § 1983 authorizes their private enforcement, should relief have been limited to a declaration of those requirements and an injunction against federal funding or was the district court authorized to appoint a master to determine the appropriate community placement for each current and potential institutional resident and to require the State to fund these placements?

4. Does Pennsylvania law create a state-funded right to treatment for the mentally retarded, and, if so, can the relief ordered by the Court of Appeals be predicated on such a right?

TABLE OF PARTIES

PETITIONERS

Commonwealth Petitioners (No. 79-1404):

Pennhurst State School & Hospital, Department of Public Welfare of the Commonwealth of Pennsylvania;

Frank S. Beal, Secretary of the Department of Public Welfare;

Stanley Meyers, Deputy Secretary for Mental Retardation, Department of Public Welfare;

Helene Wohlgemuth, Former Secretary, Department of Public Welfare;

Aldo Colautti, Executive Deputy Secretary, Department of Public Welfare;

Wilbur Hobbs, Deputy Secretary for Southeastern Region, Department of Public Welfare;

Russell Rice, Jr., Commissioner of Mental Retardation for Southeastern Region, Department of Public Welfare;

C. Duane Youngberg, Superintendent, Pennhurst State School & Hospital;

Robert Smilovitz, Former Assistant Superintendent, Pennhurst State School & Hospital;

Joseph Foster, Assistant Superintendent, Pennhurst State School & Hospital;

Margaret Green, Betty Uphold, Alice Barton, P.E. Klick, Dr. Parocca, Helen Francis, employees and agents of Pennhurst State School & Hospital;

John Doctor, James Nurse, Jane Aide, Jill Therapist, Richard Roe, Jane Doe, unknown and unnamed staff, employees and agents of Pennhurst State School & Hospital.

County and Philadelphia Petitioners (Nos. 79-1408, 79-1415):

George Metzger, Joseph Catania, and Roger Bowers, Commissioners for Bucks County;

Robert Strebl, Earl Baker and Leo McDermott, Commissioners for Chester County;

Faith R. Whittlesey, Charles Keeler, and William Springler, Commissioners for Delaware County;

A. Russell Parkhouse, Frank W. Jenkins, and Lawrence H. Curry, Commissioners for Montgomery County;

Mayor Frank L. Rizzo and the City Council of Philadelphia, as Authorities for Philadelphia County;

Peter Bodenheimber, Mental Health/Mental Retardation Administrator for Bucks County;

William A. McKendry, Mental Health/Mental Retardation Administrator for Chester County;

P. Paul Burrichter, Mental Health/Mental Retardation Administrator for Delaware County;

Hermann A. Roether, Mental Health/Mental Retardation Administrator for Montgomery County;

Leon Soffer, Mental Health/Mental Retardation Administrator for Philadelphia County, Commonwealth of Pennsylvania.

Parents-Staff Petitioner (No. 79-1489):

Pennhurst Parents-Staff Association.

* * * *

RESPONDENTS

Halderman Respondents:

Terri Lee Halderman, a retarded citizen, by her mother and guardian, Winifred Halderman;

Larry Taylor, a retarded citizen, by his parents and guardians, Elmer and Doris Taylor;

Kenny Taylor, a minor, a retarded citizen, by his parents and guardians, Elmer and Doris Taylor;

Robert Sobetsky, a minor, a retarded citizen, by his parents and guardians, Frank and Angela Sobetsky;

Theresa Sobetsky, a retarded citizen, by her parents and guardians, Frank and Angela Sobetsky;

Nancy Beth Bowman, a retarded citizen, by her parents and guardians, Mr. and Ms. Horace Bowman;

Linda Taub, a retarded citizen, by her parents and guardians, Mr. and Mrs. Allen Taub;

George Sorotos, a minor, a retarded citizen, by his foster parents, William and Marion Caranfa;

The Parents and Family Association of Pennhurst.

PARC Respondents and Cross-Petitioners (No. 79-1414):

Pennsylvania Association for Retarded Citizens;

Jo Suzanne Moskowitz, a minor, by her parents and next friends, Leonard and Nancy Moskowitz;

Robert Hight, a minor, by his parents and next friends, John and Jeanne Hight;

David Preusch, a minor, by his parents and next friends, Calvin and Elizabeth Preusch;

Charles DiNolfi.

The United States of America

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, 89a-162a [1], is reported at 612 F.2d 84. The opinion of the United States District Court for the Eastern District of Pennsylvania, 6a-75a, issued on December 23, 1977, and its order issued on March 17, 1978, 79a-88a. Both appear at 446 F. Supp. 1295.

JURISDICTION

The judgment of the Court of Appeals was entered on December 13, 1979. Commonwealth, County, and Philadelphia petitioners filed their petitions for certiorari in Nos. 79-1404, 79-1408, and 79-1415, on or before March 12, 1980. Mr. Justice Brennan extended the time for filing the petition of Pennhurst Parents-Staff Association until April 11, 1980; the Association filed its petition in No. 79-1489 on March 20, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

[1] Appendix references, cited as "—a," are to the Joint Appendix submitted with the Petitions for Writs of Certiorari filed in Nos. 79-1404, 79-1408 and 79-1415. Petitioners have filed a Motion to Dispense with the Requirement of a Joint Appendix, which is still pending before this Court.

STATUTORY PROVISIONS INVOLVED

This case involves the provisions of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000 *et seq.* (1975 & 1978 amend.), set forth in its entirety in the Appendix included in Petitioner Pennhurst Parents-Staff Association's Petition for a Writ of Certiorari, No. 79-1489. The case also involves the provisions of the Pennsylvania Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann. tit. 50, §§ 4101 *et seq.* (Purdon), set forth in relevant part at 225a-29a.

STATEMENT OF THE CASE

This case arose in May 1974, when a resident at Pennhurst Center for the Mentally Retarded ("Pennhurst") brought suit against various Pennsylvania officials in the United States District Court for the Eastern District of Pennsylvania (Broderick, J.), protesting conditions at the facility.[2] Plaintiff alleged that she was receiving substandard care at Pennhurst, and therefore, that Pennsylvania had violated her First, Eighth, Ninth and Fourteenth Amendment rights, as well as state law.[3] Plaintiff sued on her own behalf and on behalf of all

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[2] Pennhurst is located approximately 30 miles outside of Philadelphia on a large campus. Its living quarters range from small modern units to large older dormitory settings. At the time of trial, approximately 1230 mentally retarded persons resided there, almost three-quarters of whom were severely or profoundly retarded (*i.e.*, with IQ's below 35). 20a; 446 F. Supp. 1295, 1302. The district court recognized that Pennsylvania's reliance on Pennhurst had declined dramatically from the early 1960's when it housed nearly 4000 people. 19a; 446 F. Supp. 1302. Since then, Pennsylvania has relocated many of its residents in community placements. Nevertheless, institutional care remains an integral part of Pennsylvania's diversified program for the mentally retarded.

[3] Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann. tit. 50, §§ 4101 *et seq.* (Purdon) (set forth in relevant part at 225-29a).

others similarly situated,[4] seeking both monetary and injunctive relief.

Subsequently, the district court allowed the United States and the Pennsylvania Association for Retarded Citizens (PARC), along with six additional residents of Pennhurst, to intervene as plaintiffs. Seeking only injunctive relief, PARC added as defendants various officials and mental health administrators from each of the five counties surrounding Pennhurst. And, in contrast to the original plaintiff, who only sought an order improving conditions at Pennhurst, PARC contended that the State and county officials should be ordered to close the facility entirely and create community-based treatment facilities, called "community living arrangements" (CLAs), for its residents.[5] It based this claim not only on the constitutional provisions advanced by the original plaintiff, but also upon two federal statutes, § 504 of the Rehabilitation Act of 1973,[6] and the Developmentally Disabled Assistance and Bill of Rights Act (hereafter referred to as the "DD Act").[7] Subsequently, the original plaintiff filed amended complaints joining additional plaintiffs and adopting the theories of the intervenors, so that

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[4] The district court certified a class of "[a]ll persons who as of May 30, 1974, and at any time subsequent, have been or may become residents of Pennhurst . . . [including] persons resident at Pennhurst . . . , persons residing in Bucks, Chester, Delaware, Montgomery and Philadelphia Counties who are on the waiting list for placement at Pennhurst . . . and persons residing in Bucks, Chester, Delaware, Montgomery and Philadelphia Counties, who, because of the unavailability of alternative services in the community may be placed at Pennhurst. . . ." 14a; 446 F. Supp. at 1300.

[5] Although the facility is owned and operated entirely by the state, the complaint in intervention alleged that county participation would be required in any plan to close Pennhurst.

[6] 29 U.S.C. § 794 (set out at 197a).

[7] 42 U.S.C. §§ 6000 *et seq.* (set forth in its entirety in the Appendix included in Petitioner Pennhurst Parents-Staff Association's Petition for a Writ of Certiorari, No. 79-1489).

all plaintiffs and intervenors argued that large treatment facilities such as Pennhurst were by their very nature unconstitutional and otherwise illegal.[8]

After trial, the district court rejected plaintiffs' damages claim, but nonetheless concluded that they had suffered deprivations of their constitutional and statutory rights, entitling them to injunctive relief. On Eighth Amendment, Equal Protection and Due Process grounds, the court found that "an institution such as Pennhurst" was an unconstitutional mode of providing residential services to the mentally retarded. 57a-58a, 68a; 446 F.Supp. at 1317-18, 1322.[9] The trial judge also concluded that the Rehabilitation Act of 1973 "in effect codified the constitutional right to equal protection," and that "consistency" thus required him to find "that Pennhurst residents' federal statutory right to habilitation in a non-discriminatory manner ha[d] been violated" as well. 71a-72a; *id.* at 1323. In addition, the court ruled that Pennsylvania law provided plaintiffs a "right to minimally adequate habilitation." 69a; *id.* at 1322. The district court did not rule on whether the DD Act had been violated. *See* 131a n.28; 612 F.2d at 104 n.28.

Thereafter, the trial court entered an order requiring that Pennhurst be closed and that its residents, and those on its waiting list, be relocated into CLAs to be created and funded by defendants. 79a-80a; 446 F.Supp. at 1326-28. To implement this order, the court appointed a special master pursuant to Fed. R. Civ. P. 53, who was authorized to prepare and eventually effect a plan for placing the twelve hundred and thirty residents then at Pennhurst, as well as others covered by the class, into CLAs. 84a-87a; 446 F.Supp. at 1326-28. The court also entered certain

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[8] The United States rested its claim only on constitutional grounds.

[9] According to the court, Pennhurst violated its residents' constitutional rights to "minimally adequate habilitation," to "non-discriminatory habilitation" and to be "free from harm." 57a-67a; 446 F.Supp. at 1317-21.

specific injunctions relating to the operation of Pennhurst until such time as the facility was closed, and empowering the Master to supervise that "interim" operation. 85a-88a; *id.* at 1328-29.

Appeals were taken by all defendants, challenging the district court's ruling on all counts as well as the breadth of the order and its manner of implementation.[10] Argument before a panel of the United States Court of Appeals for the Third Circuit was heard on January 9, 1979. When that panel was unable to reach a majority decision, the case was reheard *en banc* on September 6, 1979. 98a-99a; 612 F.2d at 90.

A sharply divided court (per Gibbons, J.) essentially affirmed the order below, relying, however, on an entirely different legal theory. Declining to rule on the constitutional and statutory bases invoked by the district court,[11] the Court of Appeals rested its decision instead on the DD Act.[12] First, the majority concluded that Con-

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[10] The Pennhurst Parents-Staff Association, petitioner in No. 79-1489 in this Court, had sought and was denied leave to intervene in the district court. It appealed this ruling to the Court of Appeals, which upheld the district court's denial. Order of Dec. 13, 1979, No. 78-1999. Its subsequent motion to intervene in proceedings before the Court of Appeals for purposes of filing a petition for certiorari in this Court was granted on March 4, 1980.

[11] The Court of Appeals did uphold the district court's interpretation of state law, ruling that it provided a right to treatment. This aspect of the decision, however, did not form the basis for the relief granted. The court made clear that state law required only that "to the extent Pennsylvania maintains facilities for the mentally handicapped, those facilities must provide adequate treatment or habilitation." 127a; 612 F.2d at 102. Thus, the court found that only federal law required the development of CLAs.

[12] No party briefed the DD Act claim before the district court. Nor was it raised by the parties in the Court of Appeals. Rather, it was first raised by the Court of Appeals itself, which requested supplemental briefs on the issue for purposes of the rehearing *en banc*. Significantly, at that time the United States did not argue

gress had provided "the mentally retarded with a right to treatment" that must be funded by the States. 109a; 612 F.2d at 95. Next, the court determined that the Act could be enforced through private actions such as the original plaintiff's in this case. 121a-122a; *id.* at 100. And, finally, the court held that the Act required that the treatment be provided only in "the least restrictive environment." 140a; *id.* at 107.

The Court of Appeals vacated the district court's order insofar as it required closure of Pennhurst,[13] holding that, while institutions were disfavored under the DD Act, they were not prohibited. Accordingly, on remand, the district court was instructed to make "individual determinations . . . as to the appropriateness of an improved Pennhurst for each such patient." 156a; *id.* at 114. In making these determinations, however, the court was to accord a "presumption" in favor of placing people in CLAs, 159a; *id.* at 115, and the Court of Appeals made clear that, in its view, few people should remain at Pennhurst. 139a; 612 F.2d at 107.[14]

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that the district court's judgment could rest on the DD Act. It claimed only that the ruling was "in accord with the objective" of the Act. Supplemental Brief of the United States (below) at 10.

[13] The Court of Appeals also vacated that portion of the district court's order requiring that alternative employment be provided to all employees of Pennhurst. 153a; 612 F.2d at 113.

[14] On remand, the district court established detailed procedures for implementing this decree. Initially, under the supervision of the Special Master's Office, a group consisting of the Pennhurst resident, his or her parent or guardian, an advocate or next friend for the resident, and the resident's case manager are to prepare a treatment plan for the resident. The County Administrator must then, subject to the Master's approval of the plan, locate and prepare a CLA for each individual resident. At that time, if there is no dispute, the resident is moved. If there is a dispute, a second master, called a "Hearing Master," is empowered to conduct a formal hearing to decide whether continued placement at Pennhurst would be more beneficial than placement in the newly-created CLA. If not, the new placement is to go forward, subject to possible review by the district court.

[Footnote continued]

Chief Judge Seitz, joined by Judges Aldisert and Hunter, dissented. Although assuming the existence of a right to improved conditions at Pennhurst, the dissenters disputed the majority's finding of "a general right to individualized treatment in the least restrictive environment." 164a; *id.* at 117. In so doing, the dissent considered and rejected each statutory and constitutional ground asserted by plaintiffs as supporting such a right.

The state, county and Philadelphia defendants, along with the intervening Parents-Staff Association, filed petitions for certiorari. In addition, PARC filed a conditional cross-petition, contending that the Court of Appeals erred in vacating that portion of the district court's order closing Pennhurst. All petitions were granted on June 9, 1980.[15] Thereafter, on June 30, 1980, a partial stay was granted by this Court, prohibiting court-ordered "movement of residents of the Pennhurst facility to 'appropriate community living arrangements.'"

SUMMARY OF ARGUMENT

I. The DD Act does not compel the States either to fund treatment or to provide the least restrictive environment.

A. Section 6010 of the Act, designated "The Bill of Rights," must be read in conjunction with the remainder of the statute, as well as with its legislative history and governing regulations. When so read, it is clear that § 6010 is nothing more than a statement of federal policy, to be encouraged through federal funding under the Act. *See Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979). It is not a catalogue of new mandatory

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[14] [Continued]

The comprehensiveness of this remedial mechanism is reflected in the fact that from July 1978 through the end of July 1980, Pennsylvania has been ordered to pay more than $1.6 million for operation of the Master's Office and more than $30,000 for the Hearing Master.

[15] The Court declined to consider two questions presented by the petitions: (1) whether the class was properly certified; and (2) whether the United States had standing to intervene as a plaintiff.

federal standards that must be satisfied through massive financial outlays by the States.

B. Even if the Bill of Rights is read to impose certain requirements on the States, the extent of those requirements must be defined by the explicit provisions of the Bill itself, contained in § 6010(3). *See Kentucky Association for Retarded Citizens* v. *Conn*, No. C-78-0157LA (W.D. Ky. March 21, 1980).[16] That section does not compel the creation of widespread new facilities to assure treatment in the least restrictive environment. It simply prohibits the use of federal funds in any state facility that does not either provide appropriate treatment or satisfy certain basic criteria concerning food, shelter, and medical care. Thus, § 6010 at most establishes basic criteria to reinforce existing state and federal standards, not an overhaul of state programs of care for every developmentally disabled person.

II. Whatever obligations the DD Act imposes on States, it commits exclusive enforcement of those obligations to the Secretary of Health and Human Services. Although this Court recently ruled in *Maine* v. *Thiboutot*, 48 U.S.L.W. 4859 (June 25, 1980), that 42 U.S.C. § 1983 creates a private right of action to enforce rights secured by federal law, it has also recognized an exception to this remedy where Congress provides an exclusive means of enforcement. *See, e.g., Preiser* v. *Rodriguez*, 411 U.S. 475 (1973). Under the DD Act, Congress committed enforcement of all state-imposed obligations to the Secretary of Health and Human Services. Thus, Congress specifically charged the Secretary with assuring state compliance with the provisions of § 6010, *see* 42 U.S.C. § 6063(b)(5)(C), and it provided both procedures and sanctions to effectuate such compliance. Indeed, Congress specifically made allowance for private parties to participate in this carefully crafted process. To go beyond

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[16] This opinion, as yet unreported, is reprinted as an Appendix to Petitioners' Reply Memorandum on the Petitions for a Writ of Certiorari in this Court, and will be cited as "R.M. —a."

that method of enforcement, and to create a private judicial remedy as well, would both undermine a coherent enforcement approach, and open the federal courts to countless damage and injunctive actions contesting the appropriateness and restrictiveness of individual treatment programs.

III. Even if the Act imposes obligations as found by the Court of Appeals and authorizes their private enforcement, the relief ordered should have been limited to a declaration of those obligations and an injunction against federal funding under the Act. *See Rosado* v. *Wyman*, 397 U.S. 397 (1970). Congress made clear that its concern was to protect federal monies, *see* 42 U.S.C. §§ 6010 (3), 6062(a)(1)(C), and it specifically eschewed any intent to authorize a judicial takeover of the operation of state programs or facilities, *see* § 6003. By displacing traditional state administrative authority for providing care for the mentally retarded, the relief below contravenes well-settled principles of federalism as well. *See Rizzo* v. *Goode*, 423 U.S. 362 (1976).

IV. Under Pennsylvania law, services to the retarded are to be provided equitably to the extent funds are appropriated by the legislature. Pa. Stat. Ann. tit. 50, §§ 4301(d), 4509(5). The Court of Appeals recognized this funding limitation, and did not rely on state law to establish a right to treatment in the least restrictive environment. Accordingly, state law did not support its judgment. Moreover, institutional care is an integral part of Pennsylvania's statutory scheme of services for the retarded. Thus, in deciding this issue unnecessarily, and without the benefit of meaningful state court precedent, the Court of Appeals clearly misinterpreted state law.

ARGUMENT

At issue in this case is the proper application of the DD Act. The Court of Appeals, seizing on a subset of Congressional "findings" and dislodging them from their statutory context, held that the Act imposes two distinct duties on participating states: a duty to provide treatment and a duty to place each individual covered by the Act in a facility that is least restrictive of his liberty. If followed, this ruling would mean that every State must provide "appropriate treatment, services and habilitation" in the "least restrictive environment" for each of the "more than two million [developmentally disabled] persons" covered by the Act. §§ 6010(1), (2); 6000 (a)(1).[17]

Moreover, since the court below held that enforcement of these duties is lodged in the federal courts, the decision would open those courts to innumerable lawsuits by developmentally disabled persons seeking to dispute the nature or setting of their treatment. Concomitantly, as this case vividly demonstrates, the federal courts would necessarily displace state and local governments as the decisionmakers empowered to determine the proper allocation of resources and the appropriate treatment for each developmentally disabled person. The States would be left only to fund and implement the treatment prescribed by the federal court. There can be little doubt that this construction of the DD Act "would have amazed the legislators who voted for it." *Runyon* v. *McCrary*, 427 U.S. 160, 189 (1976) (Stevens, J., concurring).

Properly read, the DD Act is a funding statute, seeking to encourage state efforts to improve care for the developmentally disabled, but imposing neither of the

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[17] While this case involves only the mentally retarded, the statute in general, and the sections relied on by the Court of Appeals in particular, apply to all developmentally disabled persons. *See* 42 U.S.C. § 6001(7); 45 C.F.R. § 1385.2(a)(6).

intractable duties found by the Court of Appeals.[18] Moreover, to the extent that the Act may be read to impose such duties, it commits their enforcement exclusively to the Secretary of Health and Human Services (HHS). Finally, even if the Act is construed to create these duties and to authorize their private enforcement, relief should have been limited to a declaration of the duties and an injunction against the payment of federal monies unless the State complies with its obligations.[19]

I. THE DD ACT IMPOSES NO DUTIES ON THE STATES TO FUND "APPROPRIATE TREATMENT" OR "THE LEAST RESTRICTIVE ENVIRONMENT" FOR DEVELOPMENTALLY DISABLED PERSONS.

The Court of Appeals ruled that the DD Act created new federal obligations on the States to provide, at their own expense, appropriate treatment and to provide it in the least restrictive environment.[20] The court derived

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[18] We stress at the outset that all Petitioners agree that a State must run its institutions for the retarded in a decent and humane fashion. While we do not necessarily agree on the source[s] or contours of such a duty, we do agree that the DD Act does not impose it. Accordingly, the scope of that duty is not presented by this case. We note, in any event, that the remedy below, by authorizing the judicial takeover of Pennhurst and mandating deinstitutionalization, goes far beyond the scope of any such duty.

[19] We will further show that the Court of Appeals' interpretation of state law was also erroneous and that, in any event, even under the court's interpretation, state law does not authorize the relief imposed.

[20] Relying on the district court's opinion, the Court of Appeals defined the right to treatment (referred to interchangeably with the right to "habilitation") as "that education, training and care required by retarded individuals to reach their maximum development." 109a n.14; 612 F.2d at 95 n.14. While the court did not define the right to the least restrictive environment, it held that the right required the provision of care in CLAs except in "those individual cases, probably comparatively rare, [where] adequate habilitation could not be accomplished in any setting less restrictive than an institution. . . ." 139a; *id.* at 107.

these obligations not from any express language ordering new state funding, but by implication from the following subsections of § 6010:

> (1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.
>
> (2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the development potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.

In the Court of Appeals' view, these declarations were sufficient to impose on the States an enforceable obligation to meet such objectives, regardless of feasibility or cost.

The fundamental flaw in this analysis is its failure to recognize that a declaration of rights and an affirmative obligation to fund their enjoyment are two different things. Unlike many federal rights (such as prohibitions against discrimination), the rights recognized by the Court of Appeals do not simply *limit* state action, but require the provision of services.[21] The central question, then, as the dissent below recognized, 163a; 612 F.2d at 117, is whether Congress not only identified these general rights but also imposed the legal duty to fund them. *See Cannon* v. *University of Chicago*, 441 U.S. 677, 730 n.1 (1979) (Powell, J., dissenting) ("[i]n the context of legislation enacted by Congress, the legal requirement involved is a statutory duty"). Clearly Congress did not

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[21] This basic distinction was critical to the decision in last Term's Abortion Cases. *See* Harris v. McRae, 48 U.S.L.W. 4941, 4947 (June 30, 1980) ("Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom").

take that responsibility on itself, as it is undisputed that the limited funds allotted under the Act could hardly be deemed adequate to meet this enormous burden.[22] And, as we discuss below, it is equally clear that Congress did not implicitly place this massive obligation on the States.[23]

As Chief Judge Seitz properly explained in dissent, "[t]he broad rights declared in section 6010 can be given concrete meaning . . . only by reference to the other provisions in the Act." 168a; 612 F.2d at 119. Read in this fashion, § 6010 is clearly part of a comprehensive funding statute, designed to assist and encourage the States to improve treatment for the developmentally dis-

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[22] For the fiscal year ending September 30, 1979, Congress allocated $55 million for implementation of the Act nationally. 42 U.S.C. § 6061. Of that sum, Pennsylvania received only $1.6 million. Pennhurst alone—which has received no DD Act monies—cost more than $27 million to operate in 1976. There can be little doubt that implementation of the relief below solely at Pennhurst—let alone statewide—would cost many times the $1.6 million provided by Congress to Pennsylvania. Indeed, the operation of the Special Master's Office alone has already cost that much. *See* note 14, *supra*. It is significant in this regard that, while Congress recognized the substantial costs of mass deinstitutionalization, *see* H.R. Rep. No. 58, 94th Cong., 1st Sess. 8 (1975), *reprinted in* 2 [1975] U.S. Code Cong. & Ad. News 919, 926, it did not designate any monies for implementation of the Bill of Rights section of the Act. H.R. Conf. Rep. No. 473, 94th Cong., 1st Sess. 26 (1975), *reprinted in* 2 [1975] U.S. Code Cong. & Ad. News 943, 945; *see also* 121 Cong. Rec. 29,818 (Sept. 23, 1975).

[23] When Congress has intended that the States fund certain entitlements, it has proved capable of saying so clearly. *See, e.g.*, King v. Smith, 392 U.S. 309, 333 (1968) (Social Security Act creates "a federally imposed obligation [on the States] to furnish 'aid to families with dependent children . . . with reasonable promptness to all eligible individuals . . .'") (quoting 42 U.S.C. § 602(a)(9)). Moreover, under such circumstances, Congress typically makes a far more substantial contribution to defray costs. *See, e.g.*, Harris v. McRae, *supra*, 48 U.S.L.W. at 4944 (Medicaid statute not "a device for the Federal Government to compel a State to provide services that Congress itself is unwilling to fund").

abled, not an additional (and perhaps inconsistent) basis of state obligations. Alternatively, if § 6010 was intended to compel funding support for certain rights, the scope of that obligation is limited by the specific provisions of § 6010(3).

A. The DD Act Is A Funding Statute Designed To Assist And Encourage Improved State Care For The Developmentally Disabled.

A careful reading of the DD Act, its legislative history, and its implementing regulations all demonstrate that, far from requiring the States to fund new individual rights, the statute had a systemic focus, seeking to improve care for individuals by encouraging state planning, coordination and demonstration projects. Thus, the express "overall purpose" of the Act is:

> to *assist* States to assure that persons with developmental disabilities receive the care, treatment, and other services necessary to enable them to achieve their maximum potential through a system which coordinates, monitors, plans, and evaluates those services and which ensures the protection of the legal and human rights of persons with developmental disabilities.

42 U.S.C. § 6000(b)(1) (emphasis supplied).[24] To achieve

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[24] Its "specific purposes" are to "assist" and/or financially "support" various activities necessary to the provision of comprehensive services to the developmentally disabled. *See* 42 U.S.C. § 6000(b)(2). The governing regulations initially adopted by the Department of Health, Education and Welfare and modifications currently proposed by the Department of Health and Human Services fully support this view. *See* 45 C.F.R. § 1385.1 ("improve and coordinate the provision of services"); 45 Fed. Reg. 31,007 (May 9, 1980) ("the goal of the program is to enable States to increase the provision of quality services to persons with developmental disabilities. The goal is to be reached through the design and implementation of a comprehensive and continuing state plan which makes optimal

this purpose, the Act addresses three complementary, but separate, areas. First, it provides funding to assist the States in establishing "a system to protect and advocate the rights of persons with developmental disabilities." 42 U.S.C. § 6012.[25] Next, it authorizes separate funding to university-affiliated facilities for the operation of demonstration and training programs. 42 U.S.C. §§ 6031 *et seq.* Finally, it provides federal grants to participating States on condition that those States submit an overall plan satisfactory to the Secretary of Health and Human Services. 42 U.S.C. § 6063(a).

Although the Court of Appeals held that by accepting any funds under the Act, the States had bound themselves to underwrite the obligations the court read into § 6010, the Act itself imposes far more moderate obligations. The Secretary is required to approve state plans so long as they are in compliance with the general conditions outlined in 42 U.S.C. § 6063(b), which relate primarily to the use of funds allocated under the Act, as well as to the planning and coordination of services for the developmentally disabled.[26] While § 6063(b) includes certain

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use of Federal, State, local and private resources, and assures the rights and dignity of all those being served").

The Civil Rights Division of the United States Department of Justice, as intervenor in this and other cases, apparently takes a contrary view of the statute. See notes 8, 12, *supra*. But that Department is not charged with implementing the DD Act, and, consequently, its views are entitled to no special weight.

[25] Floor comments by Senator Kennedy indicate, as may be inferred from the Act itself, that the advocacy systems were to protect rights already established under the Constitution, as well as under other federal statutes—such as Medicaid and Social Security—and state law. 124 Cong. Rec. S 15,663 (daily ed. Sept. 21, 1978). *See also* H.R. Rep. No. 1188, 95th Cong., 2d Sess. 7 (1978), *reprinted in* 6 [1978] U.S. Code Cong. & Ad. News 7312, 7362.

[26] For example, a State's plan must provide for the establishment of a State Planning Council. 42 U.S.C. § 6063(b)(1). The plan must also set out its specific objectives, and the programs and re-

substantive standards to be satisfied by specific programs and institutions serving the developmentally disabled, 42 U.S.C. § 6063(b)(5), those standards not only are less stringent than the requirements imposed by the Court of Appeals, but also are applicable only to programs and facilities that—unlike Pennhurst—receive funds under the Act.

The distance between the obligations imposed by the Court of Appeals and the requirements of the Act can be seen at several points. For example, as plaintiffs' experts made clear, it is undisputed that a detailed individualized habilitation plan is a prerequisite to effective treatment.[27] *See* Roos, Tr. 1-118; Clements, Tr. 2-79. Yet, in a statute that the Court of Appeals read to impose an obligation to provide habilitation for all developmentally disabled persons, Congress required the provision of habilitation plans "only when the Federal Assistance under the Act contributes a portion of the cost of the habilitation services to the developmentally disabled person." H.R. Conf. Rep. No. 473, 94th Cong., 1st Sess. 43 (1975), *reprinted in* 2 [1975] U.S. Code Cong. & Ad. News 943, 963 (1975); *see* 42 U.S.C. § 6011(a). If the Court of Appeals' view were correct, of course, there would be no purpose for Congress to have required habilitation plans at all, or to have limited the requirement to

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sources to be used in reaching those objectives. Additionally, the State must specify the extent and scope of services being provided under other state plans for federally assisted state programs for the developmentally disabled. *See generally* 42 U.S.C. § 6063(b) and pp. 24-32, *infra*.

[27] A habilitation plan sets forth the long-term habilitation goals for a developmentally disabled person and the intermediate habilitation objectives relating to the attainment of those goals. The plan also states, in some detail, the manner in which those objectives will be achieved. *See* 42 U.S.C. § 6011(b).

certain programs, since such plans automatically would have been mandated in all programs by the more inclusive requirements of § 6010.

The court's ruling is likewise incompatible with the specific condition imposed in § 6063(b)(5)(C),[28] which requires a state plan to assure the Secretary of HHS that the

> human rights of all persons with developmental disabilities (especially those persons without familial protection) *who are receiving treatment, services, or habilitation under programs assisted under this chapter* will be protected consistent with section 6010 of this title . . . .

(Emphasis supplied.) *See also* 45 C.F.R. § 1386.1(b)(5)(vi). Once again, these limitations—both as to "programs *assisted* under [the Act]," and as to affording protection in a manner that is "*consistent* with section 6010"—would be unnecessary if, as the court below ruled, *all* state programs had to provide funds to assure full effectuation of the rights described in § 6010.

It is thus apparent that the "findings" in § 6010, viewed in the context of the more specific provisions of the Act, represent generalized statements of policy, not newly created legal duties.[29] When Congress intended to impose discrete legal obligations on specific programs,

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[28] This provision was added in 1978, replacing § 6063(b)(24) of the 1975 Act, which required a similar "assurance."

[29] Nor is the contrary proved by a 1978 amendment to § 6010, which provides: "The rights of persons with developmental disabilities described in findings made in this section are in addition to any constitutional or other rights otherwise afforded to all persons." This statement, adopted without any legislative history, merely expresses Congress' view that persons with developmental disabilities have rights in addition to those generally available to "all persons." Nothing in this language, however, supports an inference of substantive duties from a statement of congressional policy.

namely, those funded under the Act, it did so in clear terms. *See* §§ 6011; 6063(b)(5)(C). Certainly Congress would not explicitly condition the receipt of federal funds on satisfying limited obligations in specified programs if these obligations were already imposed on all programs by the far more demanding requirements of § 6010.[30]

Like the Act itself, its legislative history discloses a Congressional intent to encourage, rather than mandate, the provision of better services to the developmentally disabled. Decrying the patchwork of overlapping programs and gaps that it viewed as diluting its funding efforts, Congress sought to coordinate programs of aid to the developmentally disabled. *See* H.R. Rep. No. 58, 94th Cong., 1st Sess. 21-23 (1975) (letter of February 19, 1975 from HEW Secretary Weinberger), *reprinted in* 2 [1975] U.S. Code Cong. & Ad. News 919, 939-41; 121 Cong. Rec. 16,514-15, 29,818 (June 2, 1975; September 23, 1975) (comments of Senator Randolph); 121 Cong. Rec. 9,977 (April 10, 1975) (comments of Representative Carter).[31] The mechanism it chose to effectuate

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[30] The Court of Appeals' effort to impose new substantive obligations on the basis of general phrases in § 6010 is further undermined by examining other statutory language in that same section. For example, § 6010(2) also provides that "treatment, services, and habilitation . . . should be designed to *maximize* the developmental potential of the person" and § 6010(4) states that "[a]ll programs for persons with developmental disabilities should meet standards which are designed to assure the *most favorable possible outcome* for those served." (Emphasis supplied). The statements can hardly be transformed into enforceable obligations. Aside from the obviously complex and subjective questions of medical judgment posed by such "requirements," only in a world of limitless funding could they have any meaning whatsoever. As goals, however, much like the other provisions of the Bill of Rights, these provisions may properly be viewed as hopeful statements by an optimistic Congress.

[31] Similarly, in 1978 floor comments, Senator Kennedy declared:

> Since the inception of the Act in 1970, the DD program has attempted to bring together a variety of agencies tra-

this goal was funding incentives, not unconditional treatment requirements. Accordingly, the House Committee recognized that the Act was to be a "catalyst" intended to promote "effective planning by the states of their programs, initiation of new, needed programs, and filling of gaps among existing efforts." H.R. Rep. No. 58, 94th Cong., 1st Sess. 6, 21 (1975), *reprinted in* 2 [1975] U.S. Code Cong. & Ad. News 919, 924. *See also* S. Rep. No. 160, 94th Cong., 1st Sess. 1, 33, 38 (1975).

One objective that Congress initially sought to foster was increased deinstitutionalization.[32] *See, e.g.*, 121 Cong. Rec. 16,516-17 (June 2, 1975) (comments of Senator Williams); *id.* at 16,518 (comments of Senator Javits); *id.* at 9,976 (April 10, 1975) (comments of Representative Carter). But Congress nevertheless recognized that community care was a "trend" to be promoted, not inflexibly imposed without regard to existing state programs. 121 Cong. Rec. 9,978 (April 10, 1975) (comments of Representative Biaggi); H.R. Rep. No. 58, 94th Cong., 1st Sess. 8 (1975), *reprinted in* 2 [1975] U.S. Code Cong. & Ad. News 919, 926. Accordingly, the House Report stressed that the 1975 version of the Act required States to "plan for as much deinstitutionalization *as is feasible*," recognizing that this requirement would "*prompt some movement* of patients from State

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ditionally serving disabled people *to develop a coordinated and comprehensive service delivery system for its target population.*

124 Cong. Rec. S 15,671 (daily ed. Sept. 21, 1978) (emphasis supplied).

[32] By 1978, when considerably more deinstitutionalization had taken place, Congress authorized the States to shift away from this focus if they so desired. *See* pp. 21-22, *infra*. In this regard, it should be noted that, as even plaintiffs' witnesses recognized at trial, Pennsylvania was a leader in the area of deinstitutionalization. Glenn, Tr. 6-51, 69.

institutions back into their communities." H.R. Rep. No. 58, 94th Cong., 1st Sess. 8 (1975), *reprinted in* 2 [1975] U.S. Code Cong. & Ad. News 919, 928 (emphasis supplied). *See also* S. Rep. No. 160, 94th Cong., 1st Sess. 1, 33, 38 (1975).[33]

The Bill of Rights section itself was a "compromise" between the House version, which had no such section, and the Senate version, which contained detailed program standards for institutions as well as for community settings. *See* H.R. Conf. Rep. No. 473, 94th Cong., 1st Sess. 41, 43 (1975), *reprinted in* 2 [1975] U.S. Code Cong. & Ad. News 943, 961, 963. Significantly, the Senate version contained specific funding sanctions for failure to implement these detailed standards. S. 462, tit. II, § 206. *See* S. Rep. No. 160, 94th Cong., 1st Sess. 35 (1975).[34] The final version, by contrast, provides no such sanctions for failure to implement the Bill of Rights. By eliminating these sanctions, Congress made clear that the provisions of § 6010 were intended to be hortatory, not mandatory.

The detailed programmatic standards of S. 462, moreover, reflected the Senate's concern with past institutional abuses; they were not viewed as definitive federal treatment requirements to be forced on the States.[35] *See, e.g.*,

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[33] Senator Williams, a conferee on H.R. 4005, declared, "[w]e will be sending to the President today a bill which . . . will *assist* in the process of deinstitutionalization and the protection of the rights of persons with developmental disabilities." 121 Cong. Rec. 29,821 (September 23, 1975) (emphasis supplied).

[34] These penalties were not limited to funds received under the DD Act, but rather required the termination of all funding from the Federal government to a State found to be out of compliance. S. 462, tit. II, § 206; S. Rep. No. 160, 94th Cong., 1st Sess. 35 (1975). This would have included extensive federal funding under Medicaid.

[35] The hundreds of pages of program standards contained in the bill were described by the Senate Committee as only "the *beginning* of a goal we all seek—treatment and care of developmentally dis-

121 Cong. Rec. 16,516 (June 2, 1975) (comments of Senator Stafford); *id.* at 16,517 (comments of Senator Williams). To the extent that these concerns were ultimately reflected in the Bill of Rights, *see* 121 Cong. Rec. 29,820 (September 23, 1975) (comments of Senator Javits), they thus provide no basis for the approach adopted by the court below. Rather, as Senator Javits, sponsor of both the detailed standards of S. 462 and the Bill of Rights itself, made clear, the Bill was a statement of "federal policy," not a rigid declaration of enforceable duties. *Ibid.*[36]

Finally, the ruling below is directly at odds with a 1978 amendment to the Act requiring States to target federal funds received under its terms for at least one, but no more than two, of four specified areas of priority services. 42 U.S.C. § 6063(b)(4)(A)(ii). The priority areas include not only "alternative community living arrangement [CLA] services," but also individualized "case management services," "child development services," and "nonvocational social-developmental services," as well, each of which is significant in any system of care for developmentally disabled persons. 42 U.S.C. § 6001(8)(B). Congress assigned no special value to alternative CLA services in this four-area field.[37] Rather, consistent

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abled individuals which is humane, healthful, and appropriate." S. Rep. No. 160, 94th Cong., 1st Sess. 38 (1975) (emphasis supplied).

[36] Likewise, in committee hearings, legislators repeatedly asked for testimony on the expected effect of the Bill of Rights as a "model," not as a set of substantive duties. *See* Rehabilitation Amendments of 1978: Hearings on S. 2600 Before the Subcomm. on the Handicapped of the Senate Comm. on Human Resources, 95th Cong., 2d Sess. 293, 297 (1978) (questions of Senators Randolph and Stafford).

[37] To the contrary, this amendment replaced a provision in the 1975 Act specifically requiring that a State "earmark" 10 percent of its funds for deinstitutionalization expenditures in 1976 and

with its expressed desire that the States retain control of and flexibility in their delivery of services to the developmentally disabled,[38] Congress allowed participating States broad discretion to set their own budget priorities and to concentrate their resources in areas other than CLAs and deinstitutionalization. These aspects of the Act, and their legislative history, flatly contradict the holding of the court below that the DD Act requires the immediate creation of new CLAs in order to effectuate large scale deinstitutionalization.[39]

In sum, despite the broad language of § 6010, it is apparent that Congress did not intend to require the

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30 percent in succeeding years. 42 U.S.C. § 6062(a)(4) (1975) (repealed 1978). *See* H.R. Conf. Rep. No. 473, 94th Cong., 1st Sess. 32-33 (1975), *reprinted in* 2 [1975] U.S. Code Cong. & Ad. News 943, 952. Moreover, other amendments included in the 1978 Act deleted the references to deinstitutionalization that had been contained in the 1975 Act. *See, e.g.*, § 6063(b)(20), (23) (1975) (repealed 1978).

[38] Describing the advantages of this requirement, the House Committee stated that:

> First, it leaves the individual States some flexibility to choose the service areas in which Federal dollars are most needed while, at the same time, requiring each participating jurisdiction to focus the federally supported activities on clear attainable service goals. Second, it establishes a viable relationship between the service objectives of a State's plan and the Federal aid available to help meet these objectives, thus avoiding unrealistic expectations which cannot be fulfilled. Third, it permits an orderly expansion of the program as Federal support increases in future years. . . . Finally, . . . it should be considerably easier for Congress and administration officials to evaluate the national impact of the program in future years.

H.R. Rep. No. 1188, 95th Cong., 2d Sess. 10 (1978), *reprinted in* 6 [1978] U.S. Code Cong. & Ad. News 7355, 7364-65 (1978).

[39] Ironically, during this same period, Pennhurst received substantial federal funding under the Medicaid program. *See* note 43, *infra*. Such funding was not readily available for non-institutional care, thus impeding creation for CLAs. Conley, Tr. 12-29. *See also* Brief of the United States (below) at 37 n.37.

States to provide funding for a panoply of new federal rights. As this Court has previously recognized, "Congress sometimes legislates by innuendo, making declarations of policy and indicating a preference while requiring measures that though falling short of legislating its goals, serve as a nudge in the preferred directions." *Rosado* v. *Wyman*, 397 U.S. 397, 413 (1970). This is what Congress did in the DD Act.[40]

B. If § 6010 Creates Enforceable Obligations The Substance Of Those Obligations Is Defined By The Provisions Of § 6010(3).

Even if, contrary to our preceding argument, the Bill of Rights is viewed as imposing affirmative obligations on the States, the question of the scope of those obligations still remains.[41] Although the Court of Appeals be-

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[40] The well-settled distinction between Congressional "encouragement" of state programs and the imposition of binding obligations on the States was recently stressed by this Court in a case raising very similar issues to the instant one. Southeastern Community College v. Davis, 442 U.S. 397 (1979). Construing § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which bars discrimination against handicapped persons in federally-funded programs, the Court rejected a claim that a nursing school had to take affirmative steps to eliminate problems raised by an applicant's hearing disability. Finding that "state agencies such as Southeastern are only 'encourage[d] . . . to adopt such policies and procedures[,]' " 442 U.S. at 410 (quoting the Act), the Court stressed that "Congress understood [that] accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so." *Id.* at 411. Likewise in this case, Congress was aware of the needs of developmentally disabled persons and plainly understood the difference, financial and otherwise, between encouraging a specified type of treatment and mandating it.

[41] We should also point out that if § 6010 is read to create substantive rights to government-funded entitlements, there is no basis for imposing the costs on the States, rather than on the Federal government itself. As noted in this section, § 6010(3) details the obligations of *both* the Federal and State governments to monitor the use of "public funds"; and §§ 6010(1), (2) and (4) do not differentiate between any duties owed by the States as distinguished

lieved that the obligations mirror the general language of § 6010(1) and (2), we think that the guiding standards may more properly be found in the specific provisions of § 6010(3).

Unlike subsections (1) and (2) of § 6010, which are cast generally in terms of rights and objectives, the language of subsection (3) at least speaks directly to the matter of government obligations.[42] Thus, it says that both the Federal and State governments have an "obligation to assure that public funds are not provided to any institutional or other residential program" that does not either provide "appropriate treatment" or meet certain designated standards relating to matters such as proper diet, medical care, and fire and safety requirements. To the extent that § 6010 is read to impose enforceable obligations, therefore, this language necessarily must determine their scope. Any other view would make the requirements of § 6010(3) meaningless.

This precise approach was recently adopted in *Kentucky Ass'n for Retarded Citizens* v. *Conn*, No. C-78-0157LA (W.D. Ky. March 21, 1980). (R.M. 1a). Specifically rejecting the reasoning of the Court of Appeals in this case, the Kentucky court explained:

> Congress, in enacting 42 U.S.C. Sec. 6010(1) and (2), seemed to be explicit in its finding that persons

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from the Federal government. Congress made plain, moreover, that in enacting the DD Act it was entering "a partnership with the state[s] . . ." 121 Cong. Rec. 29,818 (September 23, 1975) (remarks of Senator Randolph). Thus, rather than having been an intervening plaintiff in this case, the United States should, if anything, have been a defendant, putting its resources behind its bold declaration of rights, as would a true partner. We note in this regard that the United States has been far less hospitable to such rights when it has been required to fund—rather than simply espouse—them. *See* Dixon v. Weinberger, 405 F.Supp. 974 (D.D.C. 1975).

[42] It is plain that, to the extent these obligations are enforceable, they authorize nothing more than a cut-off of federal funds. This power is already provided to HHS under the detailed provisions of § 6063. *See* page 31, *infra*.

> with developmental disabilities have a right to appropriate treatment and habilitation for those disabilities, and that the treatment and habilitation should be designed to maximize the development potential of the person in the setting that is least restrictive of his personal living. However, 42 U.S.C. Sec. 6010(3) qualifies or makes more specific the obligations of the federal government and the state, and, in essence, requires them to make certain that public funds do not flow to any institution or other residential program for the mentally retarded that either does not provide treatment and habilitation appropriate to the needs of such persons, or does not meet six specific minimum standards.

R.M. 26a. The court thus concluded that the substance of the obligations imposed on the States by § 6010 was defined by the concrete requirements of § 6010(3), and not the generalized declarations of § 6010(1) and (2).

While still exceeding the Congressional mandate, this view comes much closer to reflecting the limited purposes of the Bill of Rights than the one adopted by the court below. Recognizing that the obligations stated in § 6010 (3) were modest in nature, Congress made clear that they were *not* meant to be definitive but, rather, were to be augmented by standards imposed in *other* legislation:

> The conference committee recognizes that six minimum standards are designed to protect the *basic human needs of developmentally disabled individuals and will not in themselves ensure quality habilitation and adequate treatment programs.* The committee therefore does not intend these standards to preempt or supplant any existing Federal or State standards currently in force (*e.g.*, standards applicable to Intermediate Care Facilities for the Mentally Retarded under Medicaid), which may require more detailed or higher standards of care.

121 Cong. Rec. 29,820 (September 23, 1975) (emphasis supplied). This view is patently inconsistent with the approach taken by the court below. Hence, at most, the Bill

of Rights was intended to establish minimal requirements to supplement other state and federal standards in this area.[43]

The Court of Appeals in this case relied on subsection A of § 6010(3) which refers to "appropriate treatment, services, and habilitation", to support its conclusion that the Act creates an individual right to treatment. *See* 110a-111a; 612 F.2d at 95-96. This reliance was misplaced. Initially, the court failed to recognize that § 6010(3) speaks not in terms of individual rights, but rather in terms of standards generally applicable to "institutional or other residential programs," thus again stressing Congress' systemic concerns.[44] Moreover, the section requires facilities to provide appropriate treatment "*or*" to comply with six specific criteria; hence, its terms can be satisfied in *either* fashion.[45] Finally, far

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[43] In this regard, it should be noted that Pennhurst receives extensive funding under the Federal Medicaid statute—more than $6 million of the $27 million needed to operate it in 1975-76 (Rice, Tr. 26-14). That statute imposes detailed program standards on recipient facilities. *See* 42 U.S.C. § 1396a; 42 C.F.R. §§ 442.400 *et seq.*

[44] Section 6010(3), which obviously contemplates institutional placements, does not even mention the right to the least restrictive environment.

[45] As the court explained in Kentucky Ass'n for Retarded Citizens v. Conn, *supra*, R. M. 26a-27a:

> When paragraphs (1), (2) and (3) of 42 U.S.C. Sec. 6010 are fully examined, it seems fair to state that Congress contemplated that . . . the programs which are provided [under the Act] must either provide appropriate treatment and habilitation or meet the six standards referred to in paragraphs (3)(B)(i) through (vi) . . . . [I]t would seem that Congress realized that there might even be situations where a developmentally disabled person would not have to be furnished treatment and habilitation as such, but would have to be pro-

from imposing a right to state-funded treatment, § 6010(3) simply restricts the use of federal monies to those programs that satisfy the specified conditions.[46] In short, rather than supporting the Court of Appeals' view of the duties imposed by the Bill of Rights, § 6010(3) is plainly incompatible with that view.[47]

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vided with custodial care according to minimum standards such as proper diet, appropriate medical services, proper safety compliance, and prohibition of the use of physical restraint.

[46] The statutory proscription of § 6010(3) refers to the use of "public" funds and thus is ambiguous as to whether it applies to state as well as federal funds. Section 6062(a)(1)(C), however, indicates that Congress' concern was limited to "[s]ums allotted to the States under [the DD Act]." Likewise, in construing the Social Security Act, this Court made plain that Congress "of course, in no way prohibited [a State] from using only *state* funds according to whatever plan it chooses. . . ." Rosado v. Wyman, 397 U.S. 397, 420 (1970) (emphasis in original).

[47] We should further point out that even if § 6010 is read as imposing new obligations, not limited by the specific proscriptions of § 6010(3), there is no basis for finding a right to the least restrictive environment under § 6010(2). In contrast to § 6010(1), which states that developmentally disabled persons have a "right to appropriate treatment," § 6010(2) states only that such treatment "*should* be provided in the setting that is least restrictive of the person's personal liberty." (Emphasis supplied.) The use of the hortatory "should," when coupled with the 1978 amendment to the DD Act eliminating any requirement for creating CLAs, *see* pp. 21-22, *supra*, plainly demonstrates that even if Congress intended to require States to fund treatment, it imposed no requirement concerning the setting—community or institutional—in which such treatment was to be provided. On this basis alone, the decision below must be reversed.

II. THE SECRETARY OF HEALTH AND HUMAN SERVICES HAS EXCLUSIVE AUTHORITY TO ENFORCE ALL SUBSTANTIVE DUTIES IMPOSED BY THE DD ACT.

Assuming, *arguendo*, that § 6010 imposes legally binding obligations on the States, it still must be decided whether those obligations can be enforced by the plaintiffs to this action.[48] "[I]t is for Congress to determine how the rights which it creates shall be enforced." *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297, 301 (1943). The Court of Appeals, purporting to rely on the analysis established by *Cort* v. *Ash*, 422 U.S. 66 (1975), held that developmentally disabled persons have a private right of action to enforce § 6010 in federal court. In our view, this conclusion is incompatible with the enforcement scheme carefully designed by Congress. That scheme grants to the Secretary of HHS exclusive responsibility for enforcing all obligations imposed on the States by the Act.

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[48] In its June 9, 1980 order granting certiorari, the Court instructed the parties to address the following question:

> Does 42 U.S.C. § 1983 provide a private remedy to enforce the provisions of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6000 *et seq.*?

We address that issue here. We should note at the outset, however, that § 1983 is solely a remedial statute, providing a cause of action but creating no substantive rights. *See, e.g.*, Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 618-20 (1979). Hence the § 1983 issue need not be reached unless and until it is determined which (if any) federal rights are "secured" by the DD Act. *See, e.g.*, Southeastern Community College v. Davis, *supra*, 442 U.S. 397; Carter v. Greenhow, 114 U.S. 317 (1885). Indeed, if we are correct that the Act does not impose the obligations read into it by the court below, the "private remedy" issue need not be reached at all. *See* Southeastern Community College v. Davis, *supra*, 442 U.S. at 404 n.5.

Last Term, in *Maine* v. *Thiboutot*, *supra*, 48 U.S.L.W. at 4860, this Court ruled that 42 U.S.C. § 1983 provides a private right of action for state "deprivation[s] of any rights, privileges, or immunities secured by [all] . . . laws [of the United States]."[49] At the same time, however, it was recognized that an exception to the broad rule would apply "in cases where the governing statute provides an exclusive remedy for violations of its terms." *Maine* v. *Thiboutot*, *supra*, 48 U.S.L.W. at 4865 n.11 (Powell, J., dissenting). *See also Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 672 (1979) (White, J., concurring) (§ 1983 not applicable when there is "clear indication in a particular statute that its remedial provisions are exclusive or that for various other reasons a § 1983 action is inconsistent with congressional intention"); *Preiser* v. *Rodriguez*, *supra*, 411 U.S. 475 (habeas corpus); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 150 n.5 (1970) (public housing act). The need for such an exception is apparent, for otherwise Congress would be unable to establish cooperative federal-state programs with a specified means of review and enforcement, without automatically opening the federal courts to private suits against the participating state officials.

This exception applies with full force here. Except for § 6010, every other section of the statute that could even arguably be read as imposing a duty on the States specifies either that "the *Secretary* shall require" compliance, *e.g.*, §§ 6005, 6011 (emphasis supplied); *see generally* § 6063, or directs the State to create a specific adminis-

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[49] This ruling obviates the need to employ the four-part analysis established in Cort v. Ash, 422 U.S. 66 (1975). The *Cort* analysis would appear to remain applicable to consideration of private remedies for enforcing deprivations of federal rights in cases not involving state action.

trative agency, *see* §§ 6012, 6067.[50] And while § 6010 contains no specific enforcement provision, § 6063(b)(5)(C) makes clear that its enforcement rests with the Secretary:

> The [state] plan must contain or be supported by assurances satisfactory *to the Secretary* that the human rights of all persons with developmental disabilities (especially those persons without familial protection) who are receiving treatment, services, or habilitation under programs assisted under this chapter will be protected consistent with section 6010 of this title (relating to rights of the developmentally disabled).

(Emphasis supplied). Hence, Congress explicitly decided how it wanted to enforce the concerns reflected in § 6010.[51]

The Act, moreover, arms the Secretary with a variety of monitoring mechanisms so that she may be kept advised of information directly relevant to these Congressional concerns. Under § 6009(a), each State must submit a plan for implementing a comprehensive system

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[50] There is no claim here that Pennsylvania was deficient in establishing the requisite agencies. In any event, enforcement of such requirements through private actions would hardly seem appropriate, especially where the statute charges the Secretary with reviewing and overseeing these agencies. *See* §§ 6012(a), 6063(b). *Cf.* Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975); Nat'l RR Passenger Corp. v. Nat'l Ass'n of RR Passengers, 414 U.S. 453 (1974).

[51] It is clear that the Secretary takes this responsibility seriously. Thus, in recently proposed regulations, HHS stated:

> The Department has decided to require that all programs authorized under the Act . . . comply with Sec. 111 [§6010] of the Act. . . . Recipients of funds under the Act are to assure the State and the Commissioner that they will provide services which comply with the requirements of Sec. 111 (Rights). Failure to comply with the assurance may result in the loss of Federal funds.

45 Fed. Reg. 31,006 (May 9, 1980).

developed by HHS and designed to evaluate services provided under state programs funded through the Act. *See* 45 C.F.R. § 1385.11. This state evaluation system is required to provide objective measures of developmentally disabled persons' progress, relying on data obtained from individualized habilitation plans, *see* § 6011, and to assess service programs by their effectiveness in habilitating such persons. *See* § 6009(b). The Secretary also receives reports from the State Planning Councils, § 6067(b)(4), which are required to "monitor, review, and evaluate, not less often than annually, the implementation of [the] State plan," § 6067(b)(2), and "to the maximum extent feasible [to] review and comment on all State plans in the State which relate to programs affecting persons with developmental disabilities. . . ." § 6067(b)(3). *See also* 45 C.F.R. § 1386.24. Similarly, the State Protection and Advocacy systems mandated by § 6012 must report to the Secretary regarding their efforts in protecting the rights of the developmentally disabled.

The Act further provides effective procedures and appropriate sanctions to ensure State compliance with its dictates. The Secretary may disapprove a state plan only after "reasonable notice and opportunity for a hearing to the State." § 6063(c). At that point, the Secretary may, but is not required to, cut off some or all of the funds provided under the Act to a noncomplying State. § 6065. Any State dissatisfied with either the Secretary's disapproval of the plan, or her decision to terminate funding, may appeal to the appropriate United States Court of Appeals. § 6068.

This enforcement approach allows for meaningful participation by concerned individuals. Thus, 45 C.F.R. § 1386.94(b)(1) explicitly provides that in a compliance hearing conducted by the Secretary,

> [o]ther individuals or groups may be recognized as parties, if the issues to be considered at the hearing have caused them injury and their interest is within the zone of interests to be protected by the governing Federal statute.

The Secretary is also entitled to assurances from participating States that developmentally disabled persons and their representatives have taken part in establishing the habilitation plans required in programs funded under the Act. §§ 6011, 6063(b)(5)(B). Similarly, State Councils mandated by the Act must include developmentally disabled persons or relatives of developmentally disabled persons. § 6067(a)(2), (3); 45 C.F.R. § 1386.61. Thus, the DD Act, while confiding its enforcement solely to the Secretary, incorporates various mechanisms to assure individual participation in the process.

The legislative history confirms this view of the Secretary's exclusive enforcement power. Senator Schweiker, a co-sponsor of the Act, specifically described § 6010 as a means "to provide for the rights of developmentally disabled individuals to treatment, services, and habilitation, maximization of their developmental potential, and protection *by denial of funds* to programs which do not provide appropriate treatment, services, and habilitation or meet appropriate standards." 121 Cong. Rec. 29,820 (September 23, 1975) (emphasis supplied). And Senator Stafford stressed that the Act "strengthens the administrative ability of the Department of HEW to protect the constitutionally guaranteed rights of institutionalized individuals." *Id.* at 29,819. In short, "Congress for reasons of its own decided upon the method for the protection of the 'right' which it created. It selected the precise machinery and fashioned the tool which it deemed suitable to that end." *Switchmen's Union of North America* v. *National Mediation Board*, *supra*, 320 U.S. at 301.

The addition of a private cause of action to enforce the Act would be incompatible with this carefully-crafted scheme.[52] Particularly where the supposed rights are as amorphous as a right to appropriate treatment and a right to the least restrictive environment,[53] it is

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[52] It is true that the Conference Committee report on the Act states "that the developmentally disabled . . . have a right to receive appropriate treatment for the conditions for which they are institutionalized, and that this right should be protected and assured by Congress and the courts." H.R. Conf. Rep. No. 473, 94th Cong., 1st Sess. 42 (1975), *reprinted in* 2 [1975] U.S. Code Cong. & Ad. News 943, 961. This comment may sensibly be read to reflect congressional understanding that the courts would continue to protect constitutional rights and to enforce treatment standards imposed by *other* statutes, and that Congress, by funding commitments, would help provide as much additional treatment as feasible. *See* note 25, *supra*. It should be noted that in any case the statement does not authorize judicial enforcement by *private* individuals. On the contrary, it is fully compatible with the approach espoused before Congress by then-Assistant Secretary of HEW Kurzman, recognizing that the *Secretary* might need to seek recourse to the courts:

> [HEW's] role . . . is to set realistic enforceable standards, to require the States to conduct the kinds of surveys necessary within the facilities in those States and advise us as to the outcome of those surveys, to enforce through the States and under the medicaid program in the case of individual facilities which fail to meet those standards, or to meet the timetables for planning to meet those standards, by withholding the Federal funds, as we have done in the case of the skilled nursing facilities.
>
> In some instances, it is necessary to enforce by using the Federal courts. As you know, we have brought lawsuits against the State of Pennsylvania under the ICF-MR regulations, and I think that is a primary function.

Developmentally Disabled Assistance and Bill of Rights Act of 1975: Hearings on S. 462 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare, 94th Cong., 1st Sess. 437-38 (1975).

[53] In this respect, it is important to note that the content of the rights is far different from the monetary entitlements traditionally provided under federal statutes—such as welfare or Medicaid—that this Court has held amenable to private enforcement.

far more sensible to allow the Secretary to secure reasonable and consistent compliance rather than to subject interpretation of these rights to the ad hoc determinations of federal courts.[54] *Cf. Great American Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366 (1979); *Brown* v. *General Services Administration*, 425 U.S. 820 (1976).

An exclusive remedy, moreover, empowers the Secretary to assure *systemic* compliance with the statutory requirements without opening the federal courts to individual claims by each of the more than two million persons covered by the Act. *See Naughton* v. *Bevilacqua*, 458 F.Supp. 610, at 614-17 (D.R.I. 1978), *aff'd in part*, 605 F.2d 586 (1st Cir. 1979) (damages action for alleged inappropriate treatment of one mentally retarded person). Nor is sensible enforcement of the statute likely to be frustrated by a lack of capacity or resources on the part of the Secretary, *compare Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 708 n.42; *Allen* v. *State Board of Elections*, 393 U.S. 544, 556-57 (1969), since the number of state plans is limited and the statute specifically charges the Secretary with reviewing each state plan. *See also* n.51, *supra*.

III. EVEN ASSUMING THAT § 6010 IMPOSES PRIVATELY ENFORCEABLE STATE DUTIES THE COURT BELOW SHOULD HAVE LIMITED RELIEF TO ENJOINING FEDERAL FUNDING.

Having found that the DD Act creates privately enforceable rights to state-funded appropriate treatment

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[54] Compare the decision below with the district court decisions in Kentucky Ass'n for Retarded Citizens v. Conn, *supra*, and Naughton v. Bevilacqua, 458 F. Supp. 610 (D.R.I. 1978), *aff'd in part*, 605 F.2d 586 (1st Cir. 1979), each of which construes § 6010 differently. Similarly, the Court of Appeals for the Fourth Circuit in dicta limited enforcement of the rights under the Act to "a state judicial forum and not a federal judicial forum. . . ." United States v. Solomon, 563 F.2d 1121, 1125 (1977). *Cf. also* United States v. Mattson, 600 F.2d 1295, 1299-1300 (9th Cir. 1979).

and to the least restrictive environment, the Court of Appeals then proceeded to uphold the massive relief ordered by the district court.[55] In essence, this relief authorizes the district court (through the use of a Special Master and a Hearing Master) to determine the proper placement and services for each of the more than 1,000 residents of Pennhurst, as well as the many others covered in the class certified by the court, *see* note 4, *supra*, and to require the state and county governments to develop such placements and services, or to contract with private parties for them. *See also* note 14, *supra*. In mandating this relief the Court of Appeals went far beyond the permissible scope of its remedial powers. As this Court has made clear, a proper accommodation of state-federal interests—even in a program that truly involves joint funding—requires far less drastic relief.

The governing principles were recognized in *Rosado* v. *Wyman*, *supra*, where the Court found that New York's definition of "need" in calculating welfare payments was incompatible with the federal statute. Acknowledging the significant potential monetary implications of its ruling, the Court held that the welfare claimants were only "entitled to declaratory relief and an appropriate injunction by the district court against the payment of *federal* monies according to the new schedules, should the state not develop a conforming plan within a reasonable period of time." 397 U.S. at 420. The Court specifically rejected any suggestion that it could require New York to pay the additional sums demanded by compliance with the federal standards. Rather, relying on its earlier decision in *King* v. *Smith*, 392 U.S. 309 (1968), it explained that "the state ha[s] alternative choices of assuming the additional cost" of complying

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[55] As noted above, *see* page 6 & note 13, *supra*, the Court of Appeals vacated two aspects of that relief.

with the federal standard "or not using federal funds to pay welfare benefits according to a plan that [is] inconsistent with federal requirements." 397 U.S. at 420-21.[56]

These principles control here. As indicated above, *see* pages 23-27, *supra*, Congress' concern under the statute was to assure that *federal* funds were being used to promote certain desired policies and goals. *See* §§ 6010(3); 6062(a)(1)(C). It had no intention of authorizing a federal takeover of state care delivery systems, as § 6003 makes clear:

> Except as otherwise specifically provided, nothing in this chapter shall be construed as conferring on any Federal officer or employee the right to exercise any supervision or control over the administration, personnel, maintenance, or operation of any facility for persons with developmental disabilities with respect to which any funds have been or may be expended under this chapter.

There are no "specific" provisions that would support the intrusions sanctioned below, and thus relief should have been restricted to a declaration of rights and an injunction against funding.[57]

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[56] The Court has not deviated from this approach in subsequent cases. While it is true that the judgment in Maine v. Thiboutot, *supra*, required the State to pay monies in accordance with federal welfare requirements, the Court was careful to note that the propriety of the relief was not in question since "[t]he State did not appeal the judgment against it." 48 U.S.L.W. at 4860 n.2.

[57] The Court of Appeals concluded that the obligations in the Bill of Rights were imposed pursuant to Congress' powers under the Spending Clause. *See* 118a-19a; 612 F.2d 99. In our view, if the statute is read to authorize relief beyond a fund cut-off, Congress exceeded the limits of that power. It is one thing to say that Con-

The need to so limit relief is even more compelling here than it was in *Rosado*. First, in the welfare area, the federal government is a true financial partner, assuming a substantial portion of the financial burden. *See King* v. *Smith*, *supra*. Under the DD Act, by contrast, its financial participation is extremely limited, seeking only to provide financial incentives to participating States. *See* note 22, *supra*. Surely if Congress cannot force the States to fund entitlements when it makes a substantial contribution, it should not be able to do so when its contribution is insubstantial.

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gress may make an "offer of benefits to a state . . . dependent upon cooperation by the state with federal plans," Oklahoma v. Civil Service Commission, 330 U.S. 127, 144 (1947); it is quite another to say that, once accepted even temporarily, the offer gives the Federal government continuing control over state programs in accordance with those conditions. If the latter proposition were correct, a State that misunderstood federal conditions, or underestimated their costs to its taxpayers, would nonetheless be locked into a federal program merely by its acceptance of federal funds. "This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution." National League of Cities v. Usery, 426 U.S. 833, 852 (1976). We note, moreover, that to the extent the Court of Appeals predicated liability on state receipt of DD funds under the Act, it erroneously included in its judgment counties that never received such funds or received them only intermittently.

The court further suggested that the rights under the Act were imposed pursuant to Congress' power under § 5 of the Fourteenth Amendment. 117a; 612 F.2d at 98. In view of this Court's summary rejection of a constitutional right to treatment in the least restrictive environment, *see* Sanchez v. New Mexico, 396 U.S. 276 (1970), *dismissing for want of a substantial federal question* 80 N.Mex. 438, 457 P.2d 370 (1968); O'Connor v. Donaldson, 422 U.S. 563, 587-89 (1975) (Burger, C.J., concurring), such an exercise of congressional power would appear to be ill-founded. *Cf.* Oregon v. Mitchell, 400 U.S. 112 (1970); Katzenbach v. Morgan, 384 U.S. 641 (1966).

Second, in contrast to federal requirements under a welfare statute, which involve only cash payments, rights to "appropriate treatment" and the "least restrictive environment" involve delicate professional judgments as to appropriateness and restrictiveness. As this Court has recognized, courts are singularly ill-suited to make these determinations. Thus, in *Parham* v. *J.R.*, 442 U.S. 584 (1979), the Court stressed that "neither judges nor administrative hearing officers are better qualified than psychiatrists to render psychiatric judgments." 442 U.S. at 607, *quoting In Re Roger S.*, 19 Cal. 3d 921, 941, 141 Cal. Rptr. 298, 569 P.2d 1286, 1299 (1977) (Clark, J., dissenting). Likewise, Chief Judge Seitz, dissenting in this case, explained, "[W]hat is the least restrictive environment for any particular individual is primarily a medical question . . . [T]his concept is an uncertain one and has been the subject of fervent medical debate." 190a; 612 F.2d at 128.[58]

Moreover, the appropriateness of any given treatment, as well as the "least restrictive alternative for any particular individual will change over time. Thus, there is no single and final solution. . . ." *Ibid.*[59] As Congress

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[58] *See also* Bowring v. Godwin, 551 F.2d 44, 48 (4th Cir. 1977) ("we disavow any attempt to second-guess the propriety or adequacy of a particular course of treatment") (footnote omitted); Kentucky Ass'n for Retarded Citizens v. Conn, *supra*, R. M. 37a-38a ("whether or not to place a person in [an institution] and whether or not to continue his placement there is contingent upon the particular facts and circumstances surrounding that individual and his progress, and should be left to a decisionmaker such as the interdisciplinary team rather than in the hands of a court or court-appointed official").

[59] Nor, as Chief Judge Seitz further explained, can this analysis be "salvage[d] . . . by labelling community living arrangements as *the* least restrictive alternative." 190a; 612 F.2d at 128 (emphasis in original). As "the record indicates, . . . community living ar-

itself recognized, "persons with developmental disabilities often require specialized lifelong services to be provided by many agencies in a coordinated manner in order to meet the person's needs . . ." § 6000(a)(3). In short, affirmance of the relief imposed below would mean that "almost every decision concerning the care of a mentally retarded person would be subjected to ongoing judicial review." 190a; 612 F.2d at 128.

This Court has repeatedly stressed that federal courts should guard against assuming the authority for administering programs traditionally reserved to other authorities. *See Bell* v. *Wolfish*, 441 U.S. 520 (1979); *Rizzo* v. *Goode*, 423 U.S. 362, 378-80 (1976). Such caution is especially appropriate where the alternative of a cutoff of federal funds will fully protect the *legitimate* federal interests at stake. Thus, irrespective of the obligations imposed by the DD Act or the means provided for their enforcement, the relief authorized by the Court of Appeals must be reversed.

IV. STATE LAW PROVIDES NO RIGHT TO TREATMENT TO THE MENTALLY RETARDED.

After imposing a federal obligation on the States to provide treatment, the court below examined state law and found that it too imposes such a requirement.[60] 122a-130a; 612 F.2d at 100-03. In reaching that result, the court relied primarily on § 201,[61] which provides in pertinent part:

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rangements tend to be all things to all people." 191a n.5; *id.* at n.5 *See also* Gary W. v. Louisiana, 437 F.Supp. 1209, 1217-19 (E.D.La. 1976).

[60] The Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann. tit. 50, §§ 4101 *et seq.* (Purdon).

[61] The court also relied in part on the legislative debate of the state statute. 127a-29a; 612 F.2d at 102-03. Under Pennsylvania

> The Department [of Public Welfare] shall have power, and its duty shall be:
>
> > (1) To assure within the State the availability and equitable provision of adequate mental health and mental retardation services for all persons who need them, regardless of religion, race, color, natural origin, settlement, residence, or economic, or social status.

Pa. Stat. Ann. tit. 50, § 4201. The court found habilitation to be a mandated mental retardation service. This conclusion neither supports the judgment below, nor is it a correct interpretation of state law.[62]

Pennsylvania provides a broad spectrum of services to its mentally retarded citizens, ranging from programs designed to maintain the retarded in their natural homes, *e.g.*, 7 Pa. Bull. 1,430 (May 23, 1977), to community residences and to institutional care. The nature, extent, and manner of providing and funding those services is governed by the Mental Health and Mental Retardation Act of 1966.[63] That Act is clear that the responsibility to provide services is limited, as it must be, by the availability of appropriated funds. *County of Allegheny* v. *Commonwealth*, 33 Pa. Cmwlth Ct. 267, 381 A.2d 1014

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law, however, comments made on the floor of the legislature are irrelevant for purposes of statutory construction. Commonwealth v. Alcoa Properties, Inc., 440 Pa. 42, 46 n.1, 269 A.2d 748, 749 n.1 (1970); Martin Estate, 365 Pa. 280, 283, 74 A.2d 120, 122 (1950).

[62] Petitioner Pennhurst Parents-Staff Association joins only in those portions of this argument contending that state law does not support the judgment below.

[63] The counties provide community-based programs, generally with 90 percent funding. Pa. Stat. Ann. tit. 50, § 4509(1). The State directly provides and wholly funds institutional care. § 4507 (1). While CLAs are provided by the counties, they are 100 percent state-funded because they are considered a "new program." *See* § 4507(a)(2).

(1978). *See generally Harris* v. *McRae, supra,* 48 U.S.L.W. 4941. The court below recognized that the right to services could not be "unconditional." 127a; 612 F.2d at 102.[64] Thus, that court held only "that to the extent Pennsylvania maintains facilities for the mentally handicapped, those facilities must provide adequate treatment or habilitation." *Ibid.* It did not, however, find a state right to treatment in the least restrictive environment.[65] Nor did it limit relief to residents in those state-operated facilities.

Even this limited holding, not supported by any decision of any court of state-wide jurisdiction, misconstrues the statute. Under it, if faced with a 25 percent funding short-fall, state officials would be required to terminate all services to 25 percent of the mentally retarded. That result defies logic as well as the legislative mandate that the Department "assure . . . the *availability and equitable* provision of . . . mental retardation services for all persons who need them." Pa. Stat. Ann. tit. 50, § 4201(1) (emphasis supplied). *See also* Pa. Stat. Ann. tit. 50, § 4509(5).

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[64] In this regard, the court considered § 509(5) of the Act, which directs the State:

> In the event that sufficient funds to pay the full amount of the grants to which the counties may be entitled . . . have not been appropriated, to distribute State funds among the counties by a formula reasonably designed to achieve the objectives of this Act, provided however, that in such event the counties' financial obligations under this Act shall be reduced in accordance with the same formula *and the counties shall be required to provide only those services for which sufficient funds are available.*

Pa. Stat. Ann. tit. 50, § 4509(5) (emphasis supplied). 228a-29a.

[65] In Part VI of its opinion, 130a-141a; 612 F.2d at 103-08, in which it found such a right, the court relied solely on the DD Act. Thus, its state law holding was unnecessary and insufficient to support affirmance. *See* Murdock v. City of Memphis, 87 U.S. 429 (1875).

As importantly, the court failed to recognize that treatment is not the only basis for commitment of the retarded under state law. To the contrary, the mentally retarded may be committed when they are "in need of care or treatment." Pa. Stat. Ann. tit. 50, § 4406(a).[66] As both the legislature and Chief Judge Seitz recognized, the overriding majority of the retarded at Pennhurst are not "capable of surviving safely in freedom by [themselves]" nor do they have "willing and responsible family members or friends to provide the required care." 182a; 612 F.2d at 125, *quoting O'Connor* v. *Donaldson*, 422 U.S. 563, 576 (1975). Accordingly, the provision of care—"food, shelter, medical care and supervision for which the residents have no other source," *ibid.*—is the minimum statutory standard of services for the mentally retarded.

Finally, the Court further erred in concluding that § 201(1) imposed duties on the counties. That section is contained in Article II of the Act, entitled "Responsibilities of the State." In contrast, Article III of the Act, entitled "Responsibilities of Counties," and, in particular, § 301(d), govern the counties' obligation. Under § 301(a), Pa. Stat. Ann. tit. 50, § 4301(a), the counties are required to establish a mental retardation program. Section 301(d), in turn, establishes the required content of that program—nine mandated services ranging from emergency services to short-term inpatient care. The CLA program, established only in 1970, 176a; 612 F.2d at 122, is not among those nine statutorily mandated services. Instead, the CLA program is grounded in the State's authority to establish "new program[s]." § 4507(a)(2). Significantly, the counties' obligation to

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[66] In contrast, under a separate statute enacted in 1976, the mentally ill may be committed only when "severely mentally disabled and in need of treatment." Pa. Stat. Ann. tit. 50, § 7304(a). *See* Kremens v. Bartley, 431 U.S. 119 (1977).

provide even the nine mandated services is expressly subject to § 509(5), *see* note 64, *supra*.

Despite these limited statutory obligations, Pennsylvania has been extremely responsive to the needs of its mentally retarded citizens. As the Third Circuit itself noted just months before its decision in this case, Pennsylvania has allocated "an extraordinary large portion of its budget" to the mentally disabled. *Doe* v. *Colautti*, 592 F.2d 704, 711 (3d Cir. 1979). Further improvement and expansion of existing programs will continue. Clearly, however, Pennsylvania's present services for the mentally retarded do not violate state law.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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